

Kim (Migration) [2023] AATA 3579 (9 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Wonji Kim
REPRESENTATIVE:	Mr Faisal Bakhtiar (MARN: 1066006)
CASE NUMBER:	2003134
HOME AFFAIRS REFERENCE(S):	BCC2018/1151088
MEMBER:	Cheryl Cartwright
DATE:	9 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221 of Schedule 2 to the Regulations

Statement made on 09 October 2023 at 7:35pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – limited evidence regarding the household – social recognition of the relationship – support statements from family – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 10 March 2018 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a) because there was insufficient information to demonstrate that the applicant was the spouse or de facto partner of the sponsor as defined under s 5F and s 5CB of the Migration Act.
4. The applicant appeared before the Tribunal on 14 September 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Corey Phuc Hau Nguyen, the sponsor. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages. The applicant was represented in relation to the review. The representative attended the hearing.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether at the time of application on 10 March 2018, the applicant and the sponsor were spouses for the purposes of the Act.
7. As Middleton J stated in *Jayasinghe v MIMA* [2006] FCA 1700 at [35]:
 8. Evidence of events subsequent to the visa application is relevant if it ‘tends logically to show the existence or non-existence of facts relevant to the issue to be determined’: see *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139 at 160 per Deane J. The Tribunal must consider all relevant evidence, which may include evidence of events subsequent to the date of application insofar as it assists in the task of determining whether the appellant and the sponsor were in a marriage relationship at the time of the application. The question of whether particular evidence is relevant and the weight it is to be given is clearly a matter for the Tribunal.
9. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application. In the circumstances of this case the Tribunal considers that it is appropriate to make findings about cl 820.221 (a time of decision criterion) as well.
10. **Background**
11. The applicant is Korean and the sponsor is Vietnamese by birth. He arrived in Australia with his parents when he was one year old. The parties met in 2015 when the sponsor made an

appointment with the applicant to undertake Korean language lessons in preparation for a planned holiday in South Korea.

12. The sponsor travelled to South Korea and when he returned the parties stayed in touch and began dating. They committed to an exclusive relationship in 2016 and in 2017 they began to live together.
13. They were married on 3 April 2018 and the parties decided to live with the sponsor's parents soon after. The parties renovated the garage at the sponsor's parent's home and now reside there.
14. In a statutory declaration dated 9 May 2023, the sponsor states that the house and mortgage for the home are in his name but the house 'is for the benefit' of his parents.
15. The parties are keen to save for the future, and pay off the mortgage, but they are attracted to gambling at Crown Casino and at a gambling venue in Moorabbin.

Whether the parties are in a spouse or de facto relationship

16. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen. A copy of the sponsor's passport is on file.
17. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

18. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 3 April 2018 at Old Treasury Building, East Melbourne. A copy of the marriage certificate is on file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

19. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the persons' commitment to each other.
20. In considering these issues, the Tribunal has had regard to all of the documents on the Department's file and on the Tribunal's file.

21. *The financial aspects of the relationship*

22. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
23. There is no evidence before the Tribunal that the parties jointly own major assets or that one person in the relationship owes any legal obligation in respect of the other.
24. In his statutory declaration mentioned above, the sponsor states that he holds a mortgage over his parent's house, which is in his name, and that the applicant helps with payments. The sponsor told the hearing that the parties are keen to start a family but his debts are too high and he wants these cleared first.
25. In independent and consistent statements to the Tribunal, the parties told the hearing that they currently spend too much money 'playing pokies' together and with the sponsor's mother, but are keen to stop and start afresh next year to begin saving money.
26. In independent and consistent statements the parties told the hearing that the applicant mainly pays for groceries and the sponsor pays the major bills. They sometimes do the grocery shopping together, but the applicant mainly does the grocery shopping either alone or with the sponsor's mother.
27. The Tribunal notes the lack of information provided at the time of application about the sharing of household expenses and gives little weight to this lack of information.
28. The Tribunal gives great weight to the evidence provided to the hearing in regard to the sharing of financial resources and responsibility for household expenses and is satisfied that the parties share financial responsibilities for the household.

29. *The nature of the household*

30. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
31. There is no evidence before the Tribunal that the parties have any children together. The parties would like to start a family but want to reduce debts first.
32. In independent and consistent evidence to the Tribunal, the parties told the hearing that the applicant usually leaves washing of dishes to the sponsor, but the applicant takes responsibility for cleaning the home. The applicant occasionally cooks, but the sponsor's mother provides meals for them or they order in food.
33. As mentioned above, the applicant undertakes grocery shopping, sometimes alone and sometimes with the sponsor's mother. The sponsor will sometimes reluctantly help with grocery shopping.
34. The sponsor works in a factory, but he is studying at home and hopes to work in IT. The applicant has a painting business, painting houses – interior and exterior. The sponsor told the hearing that the applicant had assisted at the family home by painting the roof.

35. As mentioned above, the parties renovated the garage at the sponsor's parent's home and now reside there. They provided to the Tribunal photographs of the renovation process.
36. In a statutory declaration dated 9 May 2023, the sponsor's mother Thi Ghi Vu states that the parties have lived with her and her husband for five years.
37. In a statutory declaration dated 9 May 2023, the sponsor's father Van Thinh Nguyen states that the parties live in 'the back room' of the family home.
38. In an undated statement located on the Department's file, the applicant states that the parties first lived together in a Southbank apartment before moving to live with the sponsor's parents. She states that she painted the sponsor's house and the sponsor's mother 'is so happy' about that.
39. The Tribunal notes the limited evidence provided at the time of application regarding the nature of the household and gives some weight to the evidence.
40. The Tribunal notes the evidence regarding a shared household that was provided at the hearing and gives great weight to this evidence.

41. The social aspects of the relationship

42. Whether the persons represent themselves to other people as being in a spousal relationship, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
43. The Tribunal received dated and labelled photographs of the parties with friends dining out, at a friend's home, at a friend's wedding, and with friends at a local shopping centre. Although limited in number and variety, the Tribunal gives some weight to these photographs.
44. In a statutory declaration dated 8 May 2023, the sponsor's sister Mai Thu Thi Nguyen states that she sees the parties regularly and she sees the parties at all family functions.
45. In a statutory declaration dated 9 May 2023, a friend of the sponsor's sister Shelley Louise Pierini states that she has known the parties since they began dating and socialises with them regularly.
46. In a statement dated 21 September 2023, and received by the Tribunal after the hearing, Hyang Sun Im states that she became friends with the applicant after she had employed the applicant to paint her house. Ms Im states that she often visits the parties at their home and they visit her. She states that she recently moved back to Korea, but visits Australia and stays at the parties' home.
47. The Tribunal notes the lack of evidence of the social aspects of the relationship provided at the time of application and gives little weight to this lack of evidence.
48. The Tribunal gives some weight to evidence provided at the hearings by the parties and by statutory declarations by friends and relatives that the parties present themselves to other people as being in a spousal relationship, socialise to a certain extent as a couple and plan to socialise as a couple.

The nature of the persons' commitment to each other

49. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
50. The parties were married on 3 April 2018 and, at the time of the delegate's decision, were married for less than two years. At the time of this decision the parties have been married for more than five years and the Tribunal gives great weight to this length of time.
51. In her statutory declaration mentioned above, the sponsor's mother Ms Vu states she is happy that the applicant has married her son. The applicant is 'very kind, gentle and helpful' and has helped to renovate the home that the parties share with her and her husband.
52. In his statutory declaration mentioned above, the sponsor's father Mr Nguyen states that the parties 'have a great relationship' and the parties take great care of the sponsor's parents. Mr Nguyen also states that the applicant makes his son 'very happy'.
53. In her statutory declaration mentioned above, the sponsor's sister, Ms Nguyen states that the parties are a 'loving couple who often express their love for each other'.
54. The applicant told the hearing that she had supported the sponsor through his mood swings and the sponsor told the hearing that the parties have a 'perfect relationship' and rarely argue. He stated that the parties did argue in the early days of the relationship which was 'probably because of me and my moods' but he stated that the applicant understands him.
55. In independent and consistent evidence to the Tribunal hearing, the parties stated that the applicant wants to start a family immediately but both are keen to start saving money and reduce debts before this next step.
56. In an undated statement, translated from Vietnamese and received by the Tribunal on 2 October 2023, which was after the hearing, the applicant's mother Kyong OK Kim states that the applicant had told her about meeting the sponsor and 'had much to tell me' about him. This was notable because the applicant rarely told her mother many details about her friends.
57. Ms Kim states that the sponsor would visit the applicant's workplace when she had to work late and would wait for her until she had finished for the evening. Ms Kim states that the parties are 'a great match for each other'.
58. The Tribunal notes the lack of evidence provided at the time of application in relation to the parties' commitment to each other and gives little weight to this lack of evidence.
59. The Tribunal gives great weight to the evidence provided at the hearing and subsequently in the translated statement by the applicant's mother and is satisfied that the persons see their relationship as long-term and that they provide companionship and emotional support for each other.
60. **Summary**
61. The Tribunal notes that the parties provided insufficient evidence in relation to the relationship at the time of application. The sponsor told the hearing that the parties had not provided sufficient information when they first applied for the partner visa because they didn't understand the requirements. The parties were not represented at that time.

62. The Tribunal notes the parties' evidence at the hearing about their commitment to each other, their sharing of financial responsibility and the consistent evidence regarding the household. The Tribunal also notes the claims of limited social activity, other than trips to Crown Casino or a venue in Moorabbin to play poker machines, as well as the consistent statements that both parties wish to reduce this activity so they can save money.
63. On balance, the Tribunal is satisfied that the parties are in a genuine spousal relationship.
64. **Conclusion**
65. On the basis of the above the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
66. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application 10 March 2018 and at the time of this decision, the applicant and the sponsor:
- had and have a mutual commitment to a shared life as wife and husband to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.
67. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.
68. Given these findings, the Tribunal is satisfied that, at the time the visa application was made and at the time of this decision, the parties were and are in a genuine spousal relationship. Therefore, the visa applicant meets cls 820.211(2)(a) and 820.221.
69. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

70. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).